

THE HON. MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

S&W FOREST PRODUCTS, LTD., a  
British Columbia corporation,

Plaintiff,

v.

CEDAR SHAKE & SHINGLE  
BUREAU, a Washington nonprofit  
corporation; WALDUN FOREST  
PRODUCTS LTD., a British Columbia  
corporation; and ANBROOK  
INDUSTRIES LTD., a British  
Columbia corporation,

Defendants.

CASE NO. 2:19-cv-000202

**AGREEMENT  
REGARDING  
DISCOVERY OF  
ELECTRONICALLY  
STORED  
INFORMATION AND  
ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

**A. General Principles**

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and

1 contributes to the risk of sanctions.

2 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in  
3 each case when formulating a discovery plan. To further the application of the proportionality  
4 standard in discovery, requests for production of ESI and related responses should be reasonably  
5 targeted, clear, and as specific as possible.

6 **B. ESI Disclosures**

7 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the parties,  
8 each party shall disclose:

9 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,  
10 custody or control. The custodians shall be identified by name, title, connection to the instant  
11 litigation, and the type of the information under his/her control.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,  
13 servers, etc.), if any, likely to contain discoverable ESI.

14 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain  
15 discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud” storage, etc.)  
16 and, for each such source, the extent to which a party is (or is not) able to preserve information  
17 stored in the third-party data source.

18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
19 (by type, date, custodian, electronic system or other criteria sufficient to specifically  
20 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.  
21 P. 26(b)(2)(B).

22 **C. Preservation of ESI**

23 The parties acknowledge that they have a common law obligation to take reasonable and  
24 proportional steps to preserve discoverable information in the party’s possession, custody or  
25 control. With respect to preservation of ESI, the parties agree as follows:  
26

1 1. Absent a showing of good cause by the requesting party, the parties shall not be  
2 required to modify the procedures used by them in the ordinary course of business to back-up  
3 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
4 possession, custody or control.

5 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with  
6 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that  
7 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-  
8 (2) below).

9 3. Absent a showing of good cause by the requesting party, the following categories of  
10 ESI need not be preserved:

- 11 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 12 b. Random access memory (RAM), temporary files, or other ephemeral data  
13 that are difficult to preserve without disabling the operating system.
- 14 c. On-line access data such as temporary internet files, history, cache, cookies, and  
15 the like.
- 16 d. Data in metadata fields that are frequently updated automatically, such as last-  
17 opened dates (see also Section (E)(5)).
- 18 e. Back-up data that are substantially duplicative of data that are more  
19 accessible elsewhere.
- 20 f. Server, system or network logs.
- 21 g. Data remaining from systems no longer in use that is unintelligible on the systems  
22 in use.
- 23 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from  
24 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided  
25 that a copy of all such electronic data is routinely saved elsewhere (such as on a  
26 server, laptop, desktop computer, or “cloud” storage).

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1 **D. Privilege**

2 1. With respect to privileged or work-product information generated after the filing of the  
3 complaint, parties are not required to include any such information in privilege logs.

4 2. Activities undertaken in compliance with the duty to preserve information are protected  
5 from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

6 3. Information produced in discovery that is protected as privileged or work product shall  
7 be immediately returned to the producing party, and its production shall not constitute a waiver  
8 of such protection, if: (i) such information appears on its face to have been inadvertently produced  
9 or (ii) the producing party provides notice within 15 days of discovery by the producing  
10 party of the inadvertent production.

11 4. Privilege Log Based on Metadata. The parties agree that privilege logs shall include  
12 a unique identification number for each document and the basis for the claim (attorney-client  
13 privileged or work-product protection). For ESI, the privilege log may be generated using  
14 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title  
15 and date created. Should the available metadata provide insufficient information for the purpose  
16 of evaluating the privilege claim asserted, the producing party shall include such additional  
17 information as required by the Federal Rules of Civil Procedure.

18 **E. ESI Discovery Procedures**

19 1. On-site inspection of electronic media. Such an inspection shall not be permitted  
20 absent a demonstration by the requesting party of specific need and good cause or by agreement  
21 of the parties.

22 2. Search methodology. *[The Court presumes that in the majority of cases, the use of*  
23 *search terms will be reasonably necessary to locate or filter ESI likely to contain discoverable*  
24 *information.]* The parties shall timely attempt to reach agreement on appropriate search terms, or  
25 an appropriate computer- or technology-aided methodology, before any such effort is undertaken.  
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1 The parties shall continue to cooperate in revising the appropriateness of the search terms or  
2 computer- or technology-aided methodology.

3 In the absence of agreement on appropriate search terms, or an appropriate computer- or  
4 technology-aided methodology, the following procedures shall apply:

5 a. A producing party shall disclose the search terms or queries, if any, and  
6 methodology that it proposes to use to locate ESI likely to contain discoverable information. The  
7 parties shall meet and confer to attempt to reach an agreement on the producing party's search  
8 terms and/or other methodology.

9 b. If search terms or queries are used to locate ESI likely to contain  
10 discoverable information, a requesting party is entitled to no more than 5 additional terms or  
11 queries to be used in connection with further electronic searches absent a showing of good cause  
12 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the  
13 requesting party within 14 days of receipt of the producing party's production.

14 c. Focused terms and queries should be employed; broad terms or queries,  
15 such as product and company names, generally should be avoided. Absent a showing of good  
16 cause, each search term or query returning more than 250 megabytes of data is presumed to be  
17 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file  
18 types.

19 d. The producing party shall search both non-custodial data sources and ESI  
20 maintained by the custodians identified above.

21 3. Format. The parties agree that ESI will be produced to the requesting party with  
22 searchable text, in a format to be decided between the parties. Acceptable formats include, but are  
23 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),  
24 single-page TIFFs (only with load files for e-discovery software that includes metadata fields  
25 identifying natural document breaks and also includes companion OCR and/or extracted text  
26

1 files),and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily  
2 converted to image format, such as spreadsheet, database and drawing files, should be produced  
3 in native format.

4 4. De-duplication. The parties may de-duplicate their ESI production across  
5 custodial and non-custodial data sources after disclosure to the requesting party.

6 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
7 the following metadata fields need be produced: document type; custodian and duplicate  
8 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file  
9 path; date and time created, sent, modified and/or received; and hash value.

#### 10 **ADDITIONAL PROVISIONS FOR MORE COMPLEX CASES**

11 In addition to the provisions set forth in the Model ESI Agreement above, parties  
12 may find the following provisions appropriate and useful in addressing more complicated ESI  
13 discovery issues. The complexity of ESI discovery varies from case to case and is not  
14 necessarily tied to the number or size of the parties or the amount in controversy. The  
15 additional provisions below are intended to assist parties in anticipating and addressing early  
16 on more complicated ESI discovery issues but may not be appropriate or necessary in every  
17 case. The following provisions are intended as suggested provisions from which parties may  
18 pick and choose, taking into consideration the needs of the particular case.

##### 19 1. Search methodology.

20 Upon reasonable request and if appropriate for the particular case, a party shall  
21 also disclose information relating to network design, the types of databases, database  
22 dictionaries, the access control list and security access logs and rights of individuals to access  
23 the system and specific files and applications, the ESI document retention policy, organizational  
24 chart for information systems personnel, or the backup and systems recovery routines,  
25 including, but not limited to, tape rotation and destruction/overwrite policy.  
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1                   2.     Format.

2                   a.     Each document image file shall be named with a unique Bates Number (e.g.  
3 the unique Bates Number of the page of the document in question, followed by its file  
4 extension). File names should not be more than twenty characters long or contain spaces. When  
5 a text-searchable image file is produced, the producing party must preserve the integrity of the  
6 underlying ESI, i.e., the original formatting, the metadata (as noted below) and, where  
7 applicable, the revision history. The parties shall produce their information in the following  
8 format: single- page images and associated multi-page text files containing extracted text or  
9 with appropriate software load files containing all requisite information for use with the  
10 document management system (e.g., Concordance® or Summation®), as agreed to by the  
11 parties.

12                   b.     If appropriate to the particular case, the parties shall consider whether or  
13 not the full text of each electronic document shall be extracted ("Extracted Text") and produced  
14 in a text file. If the parties so agree, the Extracted Text shall be provided in searchable ASCII  
15 text format (or Unicode text format if the text is in a foreign language) and shall be named with  
16 a unique Bates Number (e.g. the unique Bates Number of the first page of the corresponding  
17 production version of the document followed by its file extension).

18                   c.     If a document is more than one page, the unitization of the document and  
19 any attachments and/or affixed notes shall be maintained as they existed in the original  
20 document.

21                   3.     Metadata fields. The parties are to confer and agree on whether metadata is to  
22 be produced or may be excluded from discovery. Metadata may not be relevant to the issues  
23 presented or, if relevant, may not be reasonably subject to discovery, or may be subject to  
24 cost- shifting, considering the factors set forth in Fed. R. Civ. P. 26(b)(2)(C). For example, if  
25 one party is producing only paper documents, and the other party is producing ESI, the parties  
26

1 should confer on whether the additional cost and burden of producing metadata by the  
2 party producing ESI is reasonable or should be shifted under the facts and circumstances of  
3 the case. If the parties agree to produce metadata, and unless otherwise agreed, each party  
4 shall produce the following metadata associated with ESI to the extent reasonably accessible:  
5 (a) the author(s) of the ESI; (b) the recipient(s) of the ESI; (c) the date the ESI was created;  
6 and (d) the source from which the ESI was produced. The “source” of ESI shall be the name  
7 of the person who was the custodian of the ESI or, if the name of a person is not available,  
8 the storage location (e.g., “Regulatory Shared Drive–Wayne, PA”). This information will  
9 be included in the “Author,” “Recipient,” “Date,” and “Source” fields (respectively) for each  
10 document in the load file associated with the document images. Although it is presumed  
11 generally that the above list of metadata fields will be provided, the list of metadata fields is  
12 intended to be flexible and may be changed by agreement of the parties, particularly in light  
13 of advances and changes in technology, vendor and business practices.

14 4. Hard-Copy Documents. If the parties elect to produce hard-copy documents in  
15 an electronic format, the production of hard-copy documents shall include a cross-reference  
16 file that indicates document breaks and sets forth the Custodian or Source associated with  
17 each produced document. Hard-copy documents shall be scanned using Optical Character  
18 Recognition technology and searchable ASCII text files shall be produced (or Unicode text  
19 format if the text is in a foreign language), unless the producing party can show that the cost  
20 would outweigh the usefulness of scanning (for example, when the condition of the paper is not  
21 conducive to scanning and will not result in accurate or reasonably useable/searchable ESI).  
22 Each file shall be named with a unique Bates Number (e.g. the Unique Bates Number of the  
23 first page of the corresponding production version of the document followed by its file  
24 extension).



1           5.    Privilege Log Based on Metadata. The parties agree that privilege logs shall  
2 be provided 30 days after the date agreed upon for final production in this matter.  
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4

5 **DATED:** May 22, 2019

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**ORDER**

Based on the foregoing, IT IS SO ORDERED.

DATED: June 7, 2019



Marsha J. Pechman  
United States Senior District Judge